92-620

No. _____

Supreme Court, U.S.
FILED
OCT 9 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

NELSON, REABE AND SNYDER, INC.,
Petitioner,

vs.

BENJAMIN H. SELPH, Individually; BRYAN W. SELPH, Individually; SELCO, INC., BENJAMIN H. SELPH AND BRYAN W. SELPH d/b/a DAYS INN HOTEL OF CLARION, PENNSYLVANIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Andrew H. McCue
CAMPBELL, HOLT & McCUE
2306 Commerce Tower
P.O. Box 13085
Kansas City, Missouri 64199
(816) 471-6630

Petitioner's Counsel of Record

Date: October 6, 1992

QUESTIONS PRESENTED

On September 21, 1990, respondents filed a complaint against petitioner in the United States District Court for the Western District of Pennsylvania. Four (4) days later, respondents filed the identical complaint in the United States District Court for the Western District of Missouri. The Missouri district court dismissed the action pending there without prejudice upon petitioner's motion, finding that respondents filed the Missouri action as part of a "contingency plan" against the adverse disposition of their Pennsylvania complaint. Rejecting virtually unanimous appellate authority supporting the district court's order, and applying instead the exceptional circumstances test articulated in *Colorado River Conservation District v. United States*, 424 U.S. 800 (1976), the United States Court of Appeals for the Eighth Circuit reversed the dismissal order as an abuse of discretion and ordered the case stayed pending the final outcome of the Pennsylvania litigation.

The questions presented are:

(1) Whether the *Colorado River* doctrine applies to cases involving wholly federal concurrent jurisdiction?

(2) Whether and under what circumstances a district court exercising its discretion under *Colorado River* may dismiss, rather than stay, the second of two identical complaints pending in separate federal district courts?

LIST OF PARTIES

The caption of this case contains the names of all parties. Petitioner Nelson, Reabe & Snyder, Inc. is a Missouri corporation with its principal place of business at 912 Baltimore, Kansas City, Missouri, 64105. Petitioner has no parent companies nor affiliates, owns no subsidiaries, either in whole or in part, and therefore has no additional parties to list pursuant to Rule 28.1.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 7

I. The Decision Below Extending the *Colorado River* Doctrine To Wholly Concurrent Federal Litigation (A) Represents A Substantial Departure From The Normal Course Of Judicial Proceedings Customarily Employed In Resolving Issues Pertaining To Such Cases And (B) Conflicts In Principle With The Decisions Of This Court And Other Circuit Courts Of Appeals 8

II. The Decision Below Resolves An Important Question Of Federal Procedural Law Which Has Not Been, But Should Be, Settled By This Court Regarding The Applicability of the *Colorado River* Doctrine To Parallel Federal Proceedings 15

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Attwood v. Mendocino Coast Dist. Hosp., 886 F.2d 241 (9th Cir. 1989) 12, 13, 14

Bergh v. State of Washington, 535 F.2d 505 (9th Cir. 1976) 10

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 9

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 2, 5, 9, 11, 14, 16

E.E.O.C. v. University of Pennsylvania, 850 F.2d 969 (3rd Cir. 1988) 10, 17

Hospah Coal Co. v. Chaco Energy Co., 673 F.2d 1161 (10th Cir.), *cert. denied*, 456 U.S. 1007 (1982) 10

Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180 (1952) 18

Landis v. North American Company, 299 U.S. 248 (1936) 8

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 675 F.2d 1169 (11th Cir. 1982) 10

Moses H. Cone Hospital v. Mercury Construction, 460 U.S. 1 (1983) 14, 16, 18

Orthmann v. Apple River Campground, 765 F.2d 119 (8th Cir. 1985) 10, 17

Pacesetter Systems, Inc. v. Medtronic, Inc., 678 F.2d 93 (9th Cir. 1982) 10

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941) 9

Remington Rand Corporation v. Business Systems Inc., 830 F.2d 1274 (3rd Cir. 1987) 10

U.S. Fire Insurance Co. v. Goodyear Tire & Rubber Co., 920 F.2d 487 (8th Cir. 1990) 10, 18

Washington Metropolitan Area Transit Authority v. Ragonese, 617 F.2d 828 (D.C. Cir. 1980) 10

West Gulf Maritime Association v. I.L.A. Deep Sea Local 24, 751 F.2d 721 (5th Cir. 1985) 10

Younger v. Harris, 401 U.S. 37 (1971) 9

STATUTES

28 U.S.C. § 1404 17

TREATISE

9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil*, § 2382 (1971) 6

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

NELSON, REABE AND SNYDER, INC.,
Petitioner,

vs.

BENJAMIN H. SELPH, Individually; BRYAN W. SELPH, Individually; SELCO, INC., BENJAMIN H. SELPH AND BRYAN W. SELPH d/b/a DAYS INN HOTEL OF CLARION, PENNSYLVANIA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

Petitioner Nelson, Reabe & Snyder, Inc. (NRS) respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this case on June 9, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 966 F.2d 411. It is reprinted in the Appendix at A2-A7, *infra*.

The order of dismissal of the United States District Court for the Western District of Missouri (Whipple, D.J.) is not reported. It is reprinted in the Appendix at A8-A11, *infra*.

JURISDICTION

Respondents' complaint filed in the United States District Court for the Western District of Missouri invoked the court's jurisdiction under 28 U.S.C. § 1332(a). The Missouri district court entered its judgment of dismissal without prejudice on April 25, 1991. On respondents' appeal, the United States Court of Appeals for the Eighth Circuit entered its judgment reversing the district court of June 9, 1992. The Eighth Circuit denied petitioner's timely petition for rehearing on July 16, 1992. (App. at A1, *infra*).

This court has jurisdiction to review the judgment of the Eighth Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case poses no issue as to any constitutional provision, treaty, statute, ordinance or regulation. It instead concerns the application of the exceptional circumstances doctrine fashioned by this Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

STATEMENT OF THE CASE

Respondents Benjamin H. Selph, Bryan W. Selph, and Selco, Inc. (the "Selphs") were named as defendants by Allen Fisher's estate in a suit filed in Pennsylvania state court arising from the Selphs' liability insurers' purported failure to honor a settlement agreement reached in compromise of a prior suit between the Fisher estate and the Selphs. The Selphs removed the second Fisher suit to the United States District Court for the Western District of Pennsylvania, and filed a third party complaint against their insurance carriers. Petitioner NRS was not and is not a party to the second Fisher suit.

Thereafter, on September 21, 1990, the Selphs filed a separate complaint against NRS in the United States District Court for the Western District of Pennsylvania, asserting its liability for having placed the Selphs' insurance coverage with the insurers the Selphs impleaded in the second Fisher suit. The Selphs invoked the Pennsylvania court's diversity jurisdiction under 28 U.S.C. § 1332. NRS asserted the defenses of personal jurisdiction and improper venue, and moved to dismiss or transfer the Pennsylvania complaint. On January 2, 1991, the Pennsylvania district court overruled petitioner's motion. The Pennsylvania district court later consolidated the Fisher/Selphs suit with the Selphs' separate complaint against NRS.

Meanwhile, on September 25, 1990, four (4) days after filing their complaint against NRS in Pennsylvania, the Selphs filed an identical complaint against NRS in the United States District Court for the Western District of Missouri. It too alleged diversity jurisdiction under 28 U.S.C. § 1332. NRS admitted jurisdiction was proper in Missouri.

In February, 1991, NRS requested the Selphs to dismiss the Missouri suit as duplicative of the Pennsylvania

action. The Selphs declined to do so unless NRS would stipulate to personal jurisdiction in Pennsylvania, or enter into a tolling agreement by which the applicable statute of limitations would be suspended during the Pennsylvania proceeding. In effect, the Selphs refused to dismiss the Missouri action unless NRS would guarantee the Selphs they would not be made to suffer the potential consequences of having sued NRS in Pennsylvania where jurisdiction was in dispute, rather than in Missouri where jurisdiction was uncontroverted.

NRS declined to accept the Selphs' conditional offer to dismiss. On March 27, 1991, NRS moved the Missouri district court to dismiss the complaint pending there, arguing it should abate in favor of litigation of the controversy in Pennsylvania where it was originally filed. The Selphs opposed petitioner's motion, arguing that *Colorado River* required the Missouri action to be stayed rather than dismissed.

Addressing the issue before it in the context of the Selphs' contention they could be "prejudiced" by the dismissal of the Missouri action, the district court observed:

> The bottom line is that plaintiffs are afraid their action against defendant in Pennsylvania may be dismissed at some future date for lack of personal jurisdiction over defendant. [Footnote omitted]. Plaintiffs, therefore, hatched this contingency plan: file the same lawsuit against defendant in this district court, where personal jurisdiction is uncontroverted, and if the lawsuit in Pennsylvania is dismissed they can just proceed with their claims against defendant in this court. The court cannot go along with this plan.

(App. at pp. A8-A9, *infra*).

The district court specifically rejected respondents' argument the Missouri action should be stayed, rather than

dismissed. It found respondents' conduct amounted to impermissible "forum shopping," and that a stay was inconsistent with wise judicial administration.

> If the court were to allow plaintiffs to file suits in this court simply because it feared dismissal on various grounds in another court, it would make a sham out of this court's jurisdiction. Additionally, allowing litigants to "safeguard" against procedural problems in one suit by filing a duplicate suit in another court clearly does not promote judicial efficiency or justice of any sort; it will only promote the flooding of courts' dockets with unnecessary suits.

(App. at A11, *infra*). Accordingly, the district court dismissed the Missouri complaint without prejudice.

The Selphs then appealed to the United States District Court for the Eighth Circuit.[1] By per curiam opinion entered June 9, 1992, the Eighth Circuit reversed the district court's order of dismissal as an abuse of discretion under *Colorado River* and ordered the Missouri action stayed pending disposition of the Pennsylvania litigation. The Eighth Circuit recited five reasons for its decision.

First, the appellate court found a stay of the Missouri proceeding was necessary to ensure the federal district court there met its "virtually unflagging obligation. . . to exercise the jurisdiction given [it]." (App. at A4, *infra, quoting, Colorado River*). The court reasoned that if the district court's order of

---

[1]During the appeal, the Selphs' lawyers were granted leave to withdraw, citing outstanding unpaid fees, the bankruptcies of two (2) of their clients, and their inability to locate or telephone the other. Under the Eighth Circuit's decision, the task of locating the Selphs to process their complaints now devolves upon the Missouri district court and NRS, a result evidently consistent with the Eighth Circuit's notion of "wise judicial administration" under *Colorado River*.

dismissal was affirmed, and if NRS successfully defended the Pennsylvania action on personal jurisdiction grounds, and if the applicable statute of limitations ran in the meantime, the Selphs could not resue NRS in Missouri. In that hypothetical scenario, "the federal court of Missouri would fail to meet its obligation." (App. at A5, *infra*).

Second, the Eighth Circuit distinguished prior authority from within the circuit supporting the district court's order of dismissal. The distinction rested upon the Eighth Circuit's conclusion that "there is not one federal court in which all of the parties agree to personal jurisdiction." (App. at A5, *infra*). That determination is not only completely unsupported by the record, it is directly contrary to it: the Missouri district court's jurisdiction over the Selph/NRS controversy was undisputed.[2] (App. at A9, *infra*).

Third, the Eighth Circuit concluded the Selphs filed the Missouri complaint "in good faith" because petitioner refused to waive its jurisdictional defenses in the Pennsylvania action. As respondents were entitled to "insurance" against NRS prevailing in Pennsylvania, the court reasoned the Selphs' filing of successive complaints was reasonable, and did not constitute impermissible "forum shopping" as the district court concluded. (App. at A5-A6, *infra*).

Fourth, the Eighth Circuit resolved a stay would save

---

[2]Apparently, the Eighth Circuit assumed that because the Selphs' Pennsylvania complaint against NRS had been consolidated with the separate Fisher/Selphs suit, all the litigants in both suits were "parties" to the same "action". Of course, it is hornbook law that consolidation under Rule 42 does not have that effect. 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil*, § 2382 at pp. 254-55 (1971) (consolidation of separate suits does not merge them into single action nor cause the parties to one suit to be parties to the other; consolidated cases retain their separate identities).

limited judicial resources consistent with the rationale of *Colorado River*. That conclusion was based upon the Eighth Circuit's determination the Selphs were entitled to litigate their claims against NRS in Pennsylvania initially where the court would have the "opportunity to comprehensively dispose of the entire case", with the comfort of a "guarantee" they could repeat the process in a Missouri federal court if petitioner successfully defended the Pennsylvania action on jurisdictional grounds. (App. at A6, *infra*). The Eighth Circuit opinion is devoid of any discussion whatsoever as to how permitting a plaintiff to try the same case twice in separate federal district courts would or could conserve limited judicial resources, much less how that result is consistent with the *Colorado River* doctrine.

Fifth, the Eighth Circuit announced that "a stay, rather than a dismissal, is the most appropriate procedural mechanism based on the principles underlying the doctrine of concurrent federal jurisdiction articulated in *Colorado River*." The court then held that under those principles the district court abused its discretion in dismissing the Missouri complaint. (App. at A6-A7, *infra*). As the Eighth Circuit did not undertake any additional explanation as to how the principles of *Colorado River* applied to the case before it, both the district court and petitioner were and are left to wonder where their analyses went awry.

NRS timely filed a petition for rehearing and a suggestion for rehearing en banc. On July 16, 1992, the Eighth Circuit denied petitioner's requests without opinion. (App. at A1, *infra*).

REASONS FOR GRANTING THE PETITION

Plaintiffs file thousands of federal complaints every day. By constitutional and statutory design intended to ensure fairness

to defendants, plaintiffs' choice of forum is limited by requirements of jurisdiction and venue. As it is possible to satisfy those requirements as to two or more federal districts at once, the district courts are vested with the inherent power to prevent the simultaneous litigation of identical complaints in separate federal districts as a matter of federal comity. *Landis v. North American Company*, 299 U.S. 248, 255 (1936). That power includes the discretion to dismiss a seemingly proper complaint where the record shows plaintiff's interests are being protected in another federal forum.

By its decision below, the Eighth Circuit has sharply limited the exercise of that discretionary power; it may divest the district court of that power altogether. The Eighth Circuit held that, faced with a motion to dismiss the second of two identical complaints pending in separate federal districts, the lower court must satisfy itself that the criteria necessary for *Colorado River* abstention exist, and, if it so finds, it may stay (but cannot dismiss) the second filed proceeding.

The Eighth Circuit decision departs substantially from the manner in which cases involving wholly federal concurrent litigation have been previously decided. It purports to answer an important question of federal procedural law that should be decided by this Court. It answers that question in a way that conflicts in principle with previous decisions of this Court, and the decisions of other circuit courts of appeals. All of those circumstances warrant immediate review.

I.

The Decision Below Extending the *Colorado River* Doctrine to Wholly Concurrent Federal Litigation (A) Represents A Substantial Departure From The Normal Course Of Judicial Proceedings Customarily Employed In

Resolving Issues Pertaining To Such Cases And (B) Conflicts In Principle With The Decisions Of This Court And Other Circuit Courts Of Appeals.

The federal courts have long recognized the fundamental distinction between the policies implicated when a federal court declines to exercise its jurisdiction in deference to a parallel state court proceeding as opposed to those implicated where a federal district court refuses to adjudicate a complaint because it is duplicative of an action filed in another federal district.

> This difference in general approach between state-federal concurrrent jurisdiction and wholly federal concurrent jurisdiction stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.

Colorado River, 424 U.S. at 817.

In recognition of that distinction, this Court has fashioned various tests for the district court's guidance in determining whether to abstain from exercising its jurisdiction in the face of a parallel state court proceeding concerning the matter in controversy.[3] Conversely, as to cases involving wholly federal

---

[3]*Colorado River*, 424 US. 800; *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Younger v. Harris*, 401 U.S. 37 (1971).

concurrent jurisdiction, the general rule is that, in the absence of compelling circumstances, a district court may exercise its discretion to dismiss the second of two identical complaints filed in separate federal districts under the so-called "first filed rule".[4]

The Eighth Circuit's decision effectively holds there is no "difference in general approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction" because it requires a district court to apply *Colorado River's* exceptional circumstances test to wholly federal parallel proceedings. The decision necessarily undermines the vitality of the "first filed rule", and therefore conflicts in principle with the decisions of the other circuit courts of appeal. Moreover, the decision strongly suggests the district court lacks the discretion to dismiss the second filed action under *Colorado River*, and may instead only stay it - a result fatally inconsistent with the holding of *Colorado River* itself. On its face, the Eighth Circuit's decision represents an extreme departure from the normal course of judicial proceedings, and warrants prompt review by this Court.

---

[4] *U.S. Fire Insurance Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488-89 (8th Cir. 1990) ("first filed rule" stated and applied); *E.E.O.C. v. University of Pennsylvania*, 850 F.2d 969, 971-72 (3rd Cir. 1988) (compelling circumstances preempted application of the "first filed rule"); *Remington Rand Corporation v. Business Systems Inc.*, 830 F.2d 1274, 1276 (3rd cir. 1987); *Orthmann v. Apple River Campground*, 765 F.2d 119, 121 (8th Cir. 1985) (compelling circumstances preempted application of "first filed rule"); *West Gulf Maritime Association v. I.L.A. Deep Sea Local 24*, 751 F.2d 721, 728-29 (5th Cir. 1985); *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982); *Hospah Coal Co. v. Chaco Energy Co.*, 673 F.2d 1161, 1163 (10th Cir.), *cert. denied*, 456 U.S. 1007 (1982): *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 675 F.2d 1169, 1174 (11th Cir. 1982); *Washington Metropolitan Area Transit Authority v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980); *Bergh v. State of Washington*, 535 F.2d 505, 506-07 (9th Cir. 1976).

Aside from extending the *Colorado River* doctrine to a class of cases to which it has never before been applied, the Eighth Circuit applies *Colorado River* in a way that conflicts in many respects with this Court's previous decisions. First, the Eighth Circuit's decision ignores the principle upon which *Colorado River* rests, namely that the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." 424 U.S. at 817. Only in exceptional circumstances may the federal courts avoid that obligation. *Id.* Contrary to the Eighth Circuit's conclusion, *Colorado River* speaks only to the questions of whether and under what circumstances a litigant may be denied of his right to have his claim resolved in federal court in deference to parallel state proceedings.

Cases involving wholly federal proceedings pose the distinct question of which of two federal courts is the more appropriate to adjudicate the claim at issue. *Colorado River* does not purport to address that issue for the simple reason that the subject claim is going to be resolved in a federal court somewhere. As a matter of the most elementary logic, the premise underlying the *Colorado River* doctrine is nonexistent in the case of wholly federal concurrent proceedings. Therefore, *Colorado River* cannot govern that category of cases.

Second, the Eighth Circuit's decision conflicts with *Colorado River's* acknowledgment that the district court may dismiss a seemingly proper complaint where deference to a parallel proceeding will reduce or eliminate the possibility of duplicative or piecemeal litigation. 424 U.S. at 818. The district court correctly concluded that dismissing the Selphs' Missouri case would ensure their action was tried once and only once, reasoning the Selphs could either litigate their claim against NRS in Missouri where jurisdiction was uncontroverted, or in Pennsylvania where personal jurisdiction was disputed. The

district court recognized that if NRS successfully defended the Pennsylvania action on personal jurisdiction grounds, the applicable statute of limitations might bar the Selphs from refiling their suit against NRS in Missouri. Nonetheless, it was unpersuaded that hypothetical "possibility of prejudice" augured against dismissal of the Missouri action:

> . . . if plaintiffs' claims against defendant are not resolved because of personal jurisdiction problems then, frankly, that [is] plaintiffs' own fault. Plaintiffs chose to sue defendant in Pennsylvania when it could just have easily have sued in Missouri where it would not be facing the same jurisdictional problems.

(App. at A10-11, n.2, *infra*).

The Eighth Circuit rejected the district court's reasoning, ignoring the Selphs' active role in bringing about the possibility of prejudice they claimed warranted a stay rather than dismissal. Relying upon *Attwood v. Mendocino Coast Dist. Hosp.*, 886 F.2d 241 (9th Cir. 1989), the Eighth Circuit concluded respondents were entitled to a stay of the Missouri action so as to "guarantee" their claim could be re-tried in Missouri if the Selphs lost in Pennsylvania on personal jurisdiction grounds. Far from heeding *Colorado River's* directive that parallel proceedings should be prioritized on the basis of reducing or eliminating the potentiality of piecemeal or duplicative litigation, the Eighth Circuit's decision expressly guarantees the Selphs the opportunity to try their case twice. How much more duplicative can a proceeding get than that; how much further can that result be from the rationale underlying *Colorado River*?

Other than *Colorado River* itself, *Attwood* was the only case cited by the Eighth Circuit in support of its unprecedented decision. In *Attwood*, plaintiff originally filed her petition in

state court and later sought leave to amend that pleading to add a Section 1983 claim. The state court denied plaintiff's motion. 886 F.2d at 242. She then served her previously filed Section 1983 federal complaint. *Id.* Applying *Colorado River*, the district court dismissed plaintiff's federal complaint. Plaintiff was thus deprived of any forum, state or federal, in which to litigate the Section 1983 claim.

On appeal, the Ninth Circuit agreed *Attwood's* claim presented the "exceptional circumstances" contemplated by *Colorado River*, and framed the pertinent issue as "[when] a district court declines to exercise its jurisdiction under *Colorado River*, may it dismiss the action without prejudice or must the court merely stay it?" *Id.* Noting the potential statue of limitations problems created by the district court's order of dismissal, the *Attwood* court concluded the district court was required to stay the federal complaint until the conclusion of the parallel state proceeding. *Id.* at 243.

Attwood thus presented the classic *Colorado River* question: whether a district court may decline to hear a case properly before it in deference to ongoing state proceedings and thereby avoid its "virtually unflagging obligation" to exercise its federal jurisdiction. That question arose solely because of the rulings of the state and federal courts where plaintiff's claims were filed, the combined effect of which deprived plaintiff of **any forum** in which to litigate her Section 1983 claim.

Unlike the situation extant in *Attwood*, there was no causal connection whatsoever between the district court's order of dismissal here and any "possibility of prejudice" to respondents. Rather, the Selphs could have easily avoided the potential statute of limitations problems they and the Eighth Circuit speculated may occur if their claims were successfully defended on personal jurisdiction grounds in Pennsylvania, by dismissing

the Pennsylvania action and litigating their claim against NRS in Missouri. *Cf., Moses H. Cone Hospital v. Mercury Construction*, 460 U.S. 1, 20 (1983) (*Colorado River* not implicated absent causal connection between determination of which court decides controversy and claimed prejudice).

Third, it is self-evident by the Eighth Circuit's decision to reverse the order of dismissal and remand the case with directions to stay the Missouri proceeding, that it perceived a functional distinction between a stay order and an order of dismissal under *Colorado River*.[5] Under this Court's prior decisions, however, there is no such distinction. "[T]he decision to invoke *Colorado River* necessarily contemplates that the federal court will have nothing further to do in resolving any substantive part of the case, whether it stays or dismisses". *Moses H. Cone*, 460 U.S. at 28. As the Eighth Circuit clearly did not intend that the Missouri district court "would have nothing further to do in resolving any substantive part of [this] case" - indeed, its decision contemplates repeating the entirety of the Pennsylvania litigation in Missouri later - it was necessary for the Eighth Circuit to disregard the functional equivalence of a stay order and a dismissal order in a true *Colorado River* case.

In summary, the Eighth Circuit's decision extends *Colorado River* to unprecedented lengths, misapplies the doctrine thus extended, supplants the long settled first filed rule followed by other circuit courts of appeal, deprives the district court of the

---

[5]It is likewise evident the Eighth Circuit followed *Attwood's* holding that a district court applying *Colorado River* must stay and cannot dismiss a parallel federal proceeding. 886 F.2d at 243. That conclusion is flatly contrary to this Court's decision in *Colorado River* itself. 424 U.S. at 821 (district court's order dismissing federal complaint affirmed).

discretion to dismiss a duplicative federal proceeding, and requires instead that it be stayed upon the request of the very party filing successive complaints, all further to the objective of "ensuring" the filing party is "guaranteed" two (2) or more federal forums in which to litigate its claim - the very result against which *Colorado River* counsels. The Eighth Circuit's decision represents a palpable departure from the normal course of judicial proceedings attendant to resolving issues of duplicative litigation in the federal courts, and necessarily conflicts in principle with the decisions of this and other appellate courts. This Court should review the Eighth Circuit's decision.

II.

The Decision Below Resolves An Important Question Of Federal Procedural Law Which Has Not Been, But Should Be, Settled By This Court Regarding The Applicability of the *Colorado River* Doctrine To Parallel Federal Proceedings.

This Courts' prior abstention decisions reflect the importance of the issue of whether and under what circumstances a federal court may decline to exercise its jurisdiction.[6] Whether the *Colorado River* doctrine even applies to cases involving wholly federal concurrent jurisdiction, and if so, how, are questions of no less importance.

The conundrum facing district courts deciding how to dispose of the second of two identical complaints filed in separate federal districts in light of the decision below is

---

[6] *Supra*, note 3.

obvious. The Eighth Circuit's decision, punctuated by its flawed analysis, provides little, if any, guidance to district judges as to how the *Colorado River* doctrine should be applied to parallel federal proceedings. Nor do this Court's decisions provide any such guidance, principally because the *Colorado River* doctrine is uniquely applicable to state-federal concurrent claims. Clearly, if the *Colorado River* doctrine is to apply to concurrent federal claims, the district courts and the appellate courts need this Court's direction about how to apply it. That much is evident from *Colorado River* itself.

Colorado River permits a federal district court to defer to a parallel proceeding "for reasons of wise judicial administration. . ." 424 U.S. at 818. Among them, a court may consider the inconvenience of the federal forum, the desirability of avoiding of piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums. *Id.* Presumably, a court may likewise consider whether the second complaint was filed to afford the filing party a tactical advantage in the jurisdiction where the claim was originally filed, and which it could not obtain absent the filing of the successive complaint. *Moses H. Cone*, 460 U.S. at 17, n.20. The majority of these factors are inapplicable to concurrent federal proceedings; the balance are encompassed within the first filed rule.

With respect to the inconvenience of the federal forum, that is a non-issue in the case of parallel federal proceedings because the parties will always end up in a federal court somewhere. Moreover, to the extent inconvenience to one of the parties is an issue, that subject is addressed by separate statute.[7]

---

[7] *See*, 28 U.S.C. § 1404.

The duplicative litigation factor is subsumed in the "first filed rule" under which the court initially seized of a controvery has priority to decide it.[8] Only where, as here, the district court stays the second proceeding pending disposition of the outcome of the original suit does the possibility of duplicative litigation even present itself, a result patently at odds with the policies underlying *Colorado River* abstention.

The order in which jurisdiction was obtained by the concurrent forums is the paramount criterion under the first filed rule.[9] Under the Eighth Circuit's analysis, it is simply another variable in the *Colorado River* calculus, and, evidently, a highly indeterminate one.

As to the motivations underlying the filing of a successive federal complaint, they are not always clear, nor are they always relevant. To the extent they are, they presumably fall within the "compelling circumstances" component of the "first filed rule."[10] Indeed, the district court in this case specifically considered respondents' motive for filing the Missouri action as evidence of a "contingency plan" "hatched" as a tactical hedge against the adverse disposition of the Pennsylvania complaint upon personal jurisdiction grounds. (App. at A9). The Eighth Circuit rejected that conclusion, for no stated reason, thus implying the *Colorado River* doctrine, at least as applied to concurrent federal claims,

---

[8] *Supra*, note 4.

[9] *Id.*

[10] *See, e.g., E.E.O.C.*, 850 F.2d at 971-72 (where record showed first federal complaint was filed as preemptive measure to posture case for litigation in federal district where law was more favorable to filing party, "compelling circumstances" militated against application of the first filed rule); *Orthmann*, 765 F.2d at 121 (first filed rule inapplicable where jurisdiction was disputed in federal district where complaint was filed originally).

requires a different or further analysis of the motivation issue than that employed by the district court. The opinion does not say how that analysis is to be performed.

By the process of elimination, the *Colorado River* doctrine as applied to cases of concurrent federal jurisdiction under the Eighth Circuit's decision yields the substantive components of the first filed rule plus some unspecified "considerations of wise judicial administration". Those considerations evidently do not include docket control, because the district court below specifically found that respondents' "contingency plan" amounted to "forum shopping" inconsistent with the promotion of judicial efficiency and justice of any sort. (App. at A11, *infra*). Once again, for unexplained reasons, the Eighth Circuit rejected that view.

Finally, corollary to the foregoing observations as to why the district courts need this Court's guidance on whether and how *Colorado River* applies to the disposition of issues relating to the concurrent litigation of identical complaints in separate federal districts, the appellate courts need that guidance as well. Under *Colorado River*, the reviewing court's task is to ascertain from the record whether the exceptional circumstances necessary to invoke *Colorado River* abstention exist. *Moses H. Cone*, 460 U.S. at 19. Unless the appellate courts are aware of the criteria the district court is to employ in ruling the issue in the first instance, they cannot adequately perform their review function. They may, as the Eighth Circuit did here, be given to substituting their judgment for the district court's on factual matters crucial to the ultimate resolution of the issue.[11]

---

[11]Under the first filed rule, the appellate court may not substitute its judgment for that of the district court. The standard of review is abuse of discretion. *U.S. Fire*, 920 F.2d at 489, n.6, *citing*, *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-84 (1952).

Whether and how the *Colorado River* doctrine applies to cases involving wholly federal concurrent litigation is an issue of important procedural law on which the appellate courts, the district courts, and litigants need this Court's guidance. This Court should accordingly grant immediate review of this case.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully submits its petition for certiorari should be granted.

ANDREW H. McCUE
CAMPBELL, HOLT & McCUE
2306 Commerce Tower
P.O. Box 13085
Kansas City, Missouri 64199
(816) 471-6630

Petitioner's Counsel of Record

APPENDIX

TABLE OF CONTENTS

Order Denying Rehearing ..... App. 1

Eighth Circuit Decision ..... App. 2

District Court's Order of Dismissal ..... App. 8

RECEIVED
JUL 20 1992

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2255WMKC

Benjamin H. Selph, et al,

Appellants,

v.

Nelson, Reabe and Snyder, Inc.,

Appellee.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

July 16, 1992

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

RECEIVED
JUN 12 1992

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 91-2255

Benjamin H. Selph, individually; Bryan W. Selph, individually; Selco, Inc., Bejamin H. Selph and Bryan W. Selph d/b/a Days Inn Hotel of Clarion, Pennsylvania,

Appellants,

v.

Nelson, Reabe and Snyder, Inc.,

Appellee.

Appeal from the United State District Court for the Western District of Missouri.

[PUBLISHED]

Submitted: January 7, 1992
Filed: June 9, 1992

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN and HANSEN, Circuit Judges.

PER CURIAM.

The Appellants (Selphs) appeal the district court's decision dismissing their complaint filed in the Western District of Missouri because they had previously filed the identical complaint in the federal district court for the Western District of Pennsylvania. We reverse the dismissal and remand to the district court with instructions to stay any further proceedings pending the resolution of the complaint filed in the Western District of Pennsylvania.

I. BACKGROUND

The Selphs operate a chain of hotels in the state of Pennsylvania. In September 1986, they purchased a liquor liability and an umbrella liability insurance policy from their insurance broker, Nelson, Reabe & Snyder, Inc. (NRS), a Missouri resident. Several months later, Allen Fisher, who allegedly consumed alcohol at one of the Selphs' hotels, left the hotel and was killed in an automobile accident. The Fisher estate sued the Selphs in Pennsylvania state court in September 1987.

In March 1989, the Fisher estate's lawsuit was settled. Selphs' insurers, however, refused to fund the settlement agreement. The Fisher estate then sued the Selphs again in Pennsylvania state court in December 1989 to enforce the settlement agreement. Shortly thereafter, the Selphs impleaded the insurance carriers and removed the case to federal court in Pennsylvania.

On September 21, 1990, the Selphs filed a separate federal complaint against NRS in the Pennsylvania federal court. Both the Fisher estate's state petition and the Selphs' federal complaint against NRS have since been consolidated in the Pennsylvania federal court.

On September 25, 1990, the Selphs filed the identical federal complaint against NRS in the Western District of Missouri. The Selphs contend that such action is necessary because the parties vigorously dispute whether the Pennsylvania federal court has personal jurisdiction over NRS. Furthermore, if the Pennsylvania federal court is found on appeal not to have jurisdiction over NRS, the Selphs contend that their cause of action against NRS in federal court in Missouri might be barred because the Missouri statute of limitations might have run.

On November 1, 1990, NRS moved the Pennsylvania

federal court to dismiss the complaint because of a lack of personal jurisdiction over NRS and improper venue. The court denied the motion on January 2, 1991. NRS subsequently requested the Selphs to voluntarily dismiss their Missouri federal complaint. The Selphs tentatively agreed, provided that either NRS stipulate that the Pennsylvania federal court has personal jurisdiction over NRS or, alternatively, that NRS will agree to waive the applicable Missouri statute of limitation. NRS rejected both stipulations.

On March 27, 1991, NRS moved the federal court in Missouri to dismiss the Selphs' parallel complaint. The court below granted NRS's motion and dismissed the complaint without prejudice on April 25, 1991, finding that the Selphs' conduct amounted to impermissible "forum-shopping." The Selphs appeal this decision.

III. DISCUSSION

The Selphs argue that any "possibility of prejudice" can be avoided by simply staying the Missouri complaint rather than dismissing it. In response, NRS argues that any prejudice to the Selphs is simply the "by-product of the Selphs' own decision to sue NRS in Pennsylvania," and therefore, the Selphs must accept the consequences, even if it means that their cause of action will be barred by the statute of limitations. We agree with the Selphs.

First, if on appeal the federal court in Pennsylvania is found not to have personal jurisdiction over NRS, only a stay ensures that the federal court in Missouri will meet its "virtually unflagging obligation . . . to exercise the jurisdiction given [it]." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). A stay tolls the statute of limitations,

which avoids the risk that the Selphs' cause of action will be time-barred, and thus guarantees the Selphs (noncitizens of Missouri) a federal forum in which to litigate their cause of action against NRS. See Attwood v. Mendocino Coast Dist. Hosp., 886 F.2d 241, 244 (9th cir. 1989). In sharp contrast, by the dismissal of the Missouri complaint, the Selphs risk the possibility that their cause of action would become time barred in Missouri, and thus, the federal court in Missouri would fail to meet its obligation.

Second, NRS argues that a district court is presumptively correct in dismissing a second filed complaint because it was previously filed in another federal district court. See Orthmann v. Apple River Campground, 765 F.2d 119, 121 (8th Cir. 1985). In Orthmann, the plaintiff filed the identical complaint in two federal district courts: initially in the District of Minnesota, and then in the Western District of Wisconsin. Id. at 120. All of the parties agreed to personal jurisdiction in Wisconsin, but the defendants vigorously disputed the issue of whether the Minnesota federal court had personal jurisdiction. Id. at 121. The Minnesota complaint was dismissed even though it was filed first, because the proceeding was further developed in the Wisconsin federal court and all of the parties agreed to personal jurisdiction in Wisconsin. Id. We find our case distinguishable from Orthmann. NRS continues to dispute whether the federal court in Pennsylvania has personal jurisdiction. Therefore, unlike Orthmann, there is not one federal court in which all of the parties agree to personal jurisdiction.

Third, we find that the Selphs filed the complaint in the Missouri federal court in good faith. To this day, NRS refuses to stipulate to personal jurisdiction in the Pennsylvania federal court. Because the Selphs filed their complaint in the Missouri federal court in order to insure a federal forum in which to

litigate their cause of action against NRS, we find that such action is reasonable under the circumstances and does not constitute impermissible "forum-shopping."

Fourth, a stay will potentially save limited judicial resources, which is a laudable goal. Colorado River, 424 U.S. at 817. The Pennsylvania federal court consolidated the Fisher estate's state petition and the Selphs' federal complaint against NRS. Since the Selphs' complaint in the Missouri federal court has been dismissed without prejudice, the Selphs are free to try to drop NRS from the Pennsylvania case and relitigate against NRS in the Missouri federal court. This would require two federal courts to dispose of portions of the total litigation. In contrast, if the Selphs' complaint in the Missouri federal court is stayed, the Pennsylvania federal court is provided the opportunity to comprehensively dispose of the entire case and thereby conserve limited judicial resources, while protecting the Selphs against an adverse personal jurisdiction result on appeal.

Finally, the Selphs argue that a stay, rather than a dismissal, is the most appropriate procedural mechanism based on the principles underlying the doctrine of concurrent federal jurisdiction articulated in Colorado River. NRS contends that the Colorado River doctrine only applies to issues involving state-federal concurrent jurisdiction and therefore is inapplicable to this case. We recognize that the Colorado River doctrine applies to issues involving state-federal concurrent jurisdiction. See Colorado River. The Supreme Court, nevertheless, discussed the issue of concurrent federal jurisdiction in Colorado River and stated that the general principle is to "avoid duplicative litigation." Colorado River, 424 U.S. at 817 (citations omitted). This principle rests upon "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" Id. (citations

omitted). Applying these principles, we find that the district court abused its discretion in dismissing the Missouri complaint. See United States Fire Ins. Co. v. Goodyear Tire & Rubber Co., 920 F.2d 487, 489 n.6 (8th Cir. 1990).

III. CONCLUSION

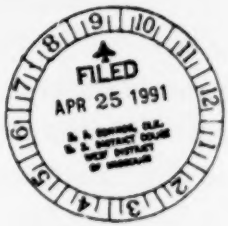
We reverse the district court's dismissal of the complaints and remand to the district court with instructions to stay any further proceedings in this case pending the resolution of the complaint filed in the Western District of Pennsylvania.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISOURI
WESTERN DIVISION



BENJAMIN H. SELPH and BRYAN W. SELPH, individually, et al.,

Plaintiffs,

v.

NELSON, REABE AND SNYDER, INC.

Defendant.

No. 90-0880-CV-W-1

RECEIVED
APR 26 1991

ORDER

Before the court is defendant's Motion to Dismiss, filed March 27, 1991. Suggestions in opposition and reply suggestions were also filed.

Defendant seeks to dismiss this action because plaintiffs already have an identical action against defendant pending in the United States District Court for the Western District of Pennsylvania; the suit in Pennsylvania was filed before this suit. Plaintiffs acknowledge their identical suit in Pennsylvania, but argue that instead of dismissing this matter it should simply be stayed to safeguard against any personal jurisdiction problems that may arise in the future in the Pennsylvania suit. Plaintiffs are also concerned that they might run into statute of limitations problems in refiling the case here should the Pennsylvania action against defendant be dismissed for lack of personal jurisdiction.

DOC. #24

The bottom line is that plaintiffs are afraid their action against defendant in Pennsylvania may be dismissed at some future date for lack of personal jurisdiction over defendant.[1] Plaintiffs, therefore, hatched this contingency plan: file the same lawsuit against defendant in this district court, where personal jurisdiction is uncontroverted, and if their lawsuit in Pennsylvania is dismissed they can just proceed with their claims against defendant in this court. The court cannot go along with this plan.

In Orthmann v. Apple River Campground, Inc., 765 F.2d 119, 121 (8th Cir. 1985), the court held that "federal comity permits a court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district." The court also noted and adhered to the Eleventh Circuit's reasoning that "'in the absence of compelling circumstances, the court initially seized of a controversy should be the one to decide the case.'" Id. (citing Merrill Lynch, Pierce, Fenner & Smith v. Haydu, 675 F.2d 1169, 1174 (11th cir. 1982)). Although the Orthmann case involved basically the inverse of the situation here (the first suit was dismissed and the second one was allowed to proceed) the principles are the same. The court allowed the second case to proceed because it was in a more advanced stage than the first case, and there apparently were no personal jurisdiction problems with the second case. But significantly, the court did not allow both cases to proceed.

Moreover, the court does not think a stay is appropriate. Plaintiffs cite some cases which appear at first glance to advocate a stay rather than a dismissal in cases such as these. However, all

---

[1]The district court of Pennsylvania has already denied defendant's motion to dismiss for lack of personal jurisdiction, but plaintiffs fear that the district court or appellate court may reconsider that ruling at a later date.

those cases are very fact specific and the rulings are tailored to apply simply to the facts of that case. The court is confident that if the same principles as pronounced in the cases cited by plaintiffs were applied to the facts of this case, the very courts cited by plaintiffs would not find that a stay was appropriate in this case.

For example, one of the main cases relied on by plaintiffs is Attwood v. Mendocino Coast District Hospital, 886 F.2d 241 (9th cir. 1989). Although the court there held that the second action should be stayed, rather than dismissed, pending the resolution of the first action[2], the court stated, "[a]s a general matter, we do not encourage forum-shopping, nor do we view the encouragement of forum-shopping as consistent with the principles of '[w]ise judicial administration'... ." Id. at 245. Plaintiffs are doing just that -- "forum-shopping". If the court were to allow plaintiffs to file suits in this court simply because it feared dismissal on various grounds in another court, it would make a sham out of this court's jurisdiction. Additionally,

---

[2]This case is clearly distinguishable from this case. In Attwood the court was faced with a situation where the plaintiff had filed a state suit against defendant, and had attempted, without success, to amend the state complaint to include a 42 U.S.C. § 1983 claim. The plaintiff, therefore, filed the same action as that filed in state court but with the § 1983 claim included.

Fearing that the state court would not be adequate for providing plaintiff complete relief (since the state court had refused to allow her to add the § 1983 claim), the court found that dismissal of the federal action should simply be stayed so that plaintiff could be assured of having all her claims resolved. Attwood, 886 F.2d at 243. The court was also concerned that the "federal court. . .meet its 'unflagging duty' to exercise its jurisdiction." Id. at 244.

The facts of this case do not present any of the problems faced by the court in Attwood. Here, a federal court (in Pennsylvania) has already exercised its jurisdiction over all of plaintiffs' claims; and if plaintiffs' claims against defendant are not resolved because of personal jurisdiction problems then, frankly, that plaintiffs' own fault. Plaintiffs chose to sue defendant in Pennsylvania, when it could just as easily have sued in Missouri where it would not be facing the same jurisdiction problems.

allowing litigants to "safeguard" against procedural problems in one suit by filing a duplicate suit in another court clearly does not promote judicial efficiency or justice of any sort; it would only promote the flooding of courts' dockets with unnecessary suits.

Accordingly, it is

ORDERED that defendant's Motion to Dismiss, filed March 27, 1991 is GRANTED. It is further

ORDERED that this matter is dismissed without prejudice.

Dean Whipple

DEAN WHIPPLE
UNITED STATE DISTRICT JUDGE

DATE: April 25th, 1991